



- (1) Whether the Administrative Law Judge erred in rejecting the medical report of Dr. P. Brent Koprivica as being in violation of K.S.A. 44-510(c)(2).
- (2) What, if any, is the nature and extent of claimant's injury and/or disability?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the whole evidentiary record filed herein and, in addition, the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury arising out of and in the course of his employment with respondent on December 10, 1993. On that date, while climbing ladders and cleaning around a house where there had been a fire, claimant injured his leg and low back. Claimant was sent to Dr. Joseph Ketcherside who prescribed physical therapy and work hardening. He was released to go back to work on May 9, 1994 but found he could not perform his job tasks at respondent's employment. He found another job in June 1994 at Harts Auto Repair making \$5.50 an hour on a part-time basis.

Claimant was referred to Dr. P. Brent Koprivica at claimant's counsel's request on December 8, 1994 for an independent medical examination. Dr. Koprivica opined claimant had suffered an 80 percent loss of task-performing abilities as a result of the injuries of December 10, 1993. Dr. Koprivica's history indicated claimant had suffered preexisting problems in 1988 and 1989 but that claimant had returned to work without restrictions after the 1989 incident. Dr. Koprivica was unaware that claimant had experienced low back pain from 1988, that claimant suffered continuous low back problems and discomfort, and used pain pills daily, during this time period. Dr. Koprivica was further unaware that claimant had missed five and one-half months of work from a 1991 injury. His opinion regarding the claimant's loss of task-performing abilities does not take into consideration any preexisting restrictions or problems.

When Dr. Koprivica was contacted by claimant's attorney he was asked to perform a physical examination of claimant, review medical records and reports and provide his opinion as to the degree of permanent functional impairment, if any, experienced by claimant as a result of his work-related injuries. He was further asked about physical restrictions and vocational rehabilitation if appropriate.

K.S.A. 44-510e(a) states in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment."

K.S.A. 44-510(c)(2) states as follows:

"Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such health care provider up to a total amount of \$500. The amount allowed for such examination, diagnosis or treatment shall not be used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act."

Respondent argues the medical report of Dr. Koprivica should be excluded as being in violation of K.S.A. 44-510(c)(2). The Administrative Law Judge both refused to order payment by the respondent of unauthorized medical for this report and excluded Dr. Koprivica's report from evidence. The Appeals Board feels that had unauthorized medical been used to pay for the report of Dr. Koprivica, the application of K.S.A. 44-510(c)(2) would be appropriate. The letter to Dr. Koprivica from claimant's attorney shows a clear intent that this single examination of Dr. Koprivica was to be used at least partially for the obtaining of a functional impairment rating. The exclusion of the medical opinion is appropriate when the unauthorized medical is used to obtain a functional impairment rating in violation of the statute. The unauthorized medical allowance was not used in such fashion and, thus, the medical report of Dr. Koprivica should have been admitted into the record and considered by the Administrative Law Judge. The Appeals Board finds, with regard to this ruling, the Award should be reversed.

The Appeals Board must next consider the weight which should be given to the report of Dr. Koprivica. In a workers compensation proceeding it is the claimant's burden to prove by a preponderance of the credible evidence his entitlement to the benefits claimed due and owing. K.S.A. 44-501; K.S.A. 44-508(g). His right to a recovery must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App.2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The medical evidence of Dr. Koprivica is based, to a significant part, on the history provided to Dr. Koprivica by claimant. Dr. Koprivica's history contained no information regarding the 1989 restrictions placed upon claimant. It further lacked information regarding the claimant's 1988 back injury, continuous ongoing low back pain and discomfort and the use of pain pills on a daily basis for a several-year period. Dr. Koprivica's medical reports did not contain information regarding the five and one-half months' work claimant missed in 1991 all of which Dr. Koprivica indicated would have had a significant effect on his opinion. In discussing restrictions placed upon claimant, Dr. Koprivica did not distinguish between claimant's 1988, 1991 or 1993 injuries. Dr. Koprivica's medical reports did not even mention the May 31, 1991 injury at Midwest Technical Maintenance. He was not informed of medical findings suggestive of nerve root

irritation, strength losses and difficulty in heel and toe walking. He was also unaware of x-rays in 1992 showing lumbar spine degenerative changes.

As the trier of fact the Appeals Board must consider all evidence of a credible nature. Dr. Koprivica acknowledged that the inaccurate history provided him of claimant's past back problems had an effect upon his ability to assess claimant's functional impairment, need for restrictions and the appropriate task loss resulting from claimant's 1993 injury. As such, the Appeals Board finds Dr. Koprivica's medical opinions cannot be deemed credible medical evidence.

Claimant was examined and treated by Dr. Ketcherside from 1988 forward. Dr. Ketcherside had the opportunity to review claimant's past medical problems and history, place significant restrictions on him and review a multitude of tests performed on claimant over a several-year period. Dr. Koprivica felt that claimant's restrictions to his ability to perform job tasks preexisted his 1993 injury. Dr. Koprivica's report went into detail regarding the percentage of claimant's job tasks from his farm work, construction work, work at Midwest Technical and the work at respondent Fire Works and how each would be affected by his ongoing injuries and symptomatology. Dr. Koprivica opined that claimant's disability was no greater subsequent to the 1993 injury than that which preexisted the injury. Thus, the Appeals Board finds claimant suffered no task-performing loss as a result of this injury.

Claimant was unable to return to work with respondent subsequent to this injury and as a result suffered a loss of wage-earning ability. K.S.A. 44-510e(a) requires that the ability to perform work tasks lost by claimant be averaged together with the difference between the average weekly wage claimant was making at the time of the injury and the average weekly wage the worker is earning after the injury. In this case, claimant had suffered an actual wage loss subsequent to the injury. The Administrative Law Judge found, when comparing claimant's pre-accident average weekly wage of \$423.34 to claimant's current wage of \$184.39, claimant had suffered a loss of 56.5 percent loss in wage earnings. In following the language of K.S.A. 44-510e(a), the difference in wage earnings suffered by claimant, when averaged with claimant's percent loss of ability to perform work tasks, results in a work disability of 28.25 percent. The Appeals Board finds claimant is entitled, in this case, to a work disability of 28.25 percent for the injuries suffered on December 10, 1993.

The Kansas Workers Compensation Fund was ordered to pay the entire award in this matter. That issue has not been appealed and the Workers Compensation Appeals Board affirms the Administrative Law Judge's findings in that regard and adopts same herein as its own.

The Fund argues under K.S.A. 44-501(c) they would be entitled to a reduction of claimant's preexisting functional impairment in this matter. The parties have stipulated that claimant suffered a 25.5 percent permanent partial general body functional impairment as a result of the injuries on the date alleged, 20 percent of which preexisted claimant's injury. The language of K.S.A. 44-501(c) states:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

In computing claimant's work disability the opinion of Dr. Ketcherside shows that claimant's task-performing losses were suffered prior to the 1993 incident. As such, claimant was granted no disability for his loss of task-performing ability from the preexisting problems. Had claimant been awarded a portion of his task loss from the earlier injuries, the reduction in functional impairment would be appropriate. Here, however, the Appeals Board finds that a reduction in claimant's functional impairment following a denial of an award for claimant's prior task-performing loss would, in effect, be a double penalty to the claimant. The Fund's request for a reduction in functional impairment determined to be preexisting is denied and claimant is awarded a 28.25 percent permanent partial general body work disability as a result of the injuries suffered December 10, 1993.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated August 14, 1995 should be, and is hereby, reversed in part and modified in part and claimant is granted an award against respondent, Fire Works of Kansas City, and its insurance carrier, Continental National American Group, and the Kansas Workers Compensation Fund for a 28.25% permanent partial general body work disability as a result of injuries suffered on December 10, 1993 and based upon an average weekly wage of \$423.34. Claimant is entitled to 17 weeks temporary total disability compensation at the rate of \$282.24 totaling \$4,798.08, followed by 116.67 weeks permanent partial disability compensation at the rate of \$282.24 per week totaling \$32,928.94 for a total award of \$37,727.02.

As of March 5, 1996, claimant would be entitled to 17 weeks temporary total disability compensation at the rate of \$282.24 per week in the amount of \$4,798.08, followed thereafter by 99.57 weeks permanent partial general body disability at the rate of \$282.24, totaling \$28,102.64 for a total of \$32,900.72 which is due and owing in one lump sum minus amounts previously paid. Thereafter, the remaining 17.1 weeks permanent partial general body disability shall be paid at the rate of \$282.24 until fully paid or until further order of the Director.

Additional issues raised by the parties before the Administrative Law Judge but not appealed to the Workers Compensation Appeals Board are herein affirmed by the Appeals Board in toto.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund to be paid as follows:

Hostetler & Associates, Inc.	\$292.45
Transcript of Regular Hearing, May 23, 1995	
Gene Dolginoff Associates, Ltd.	\$689.25
Deposition of P. Brent Koprivica, May 31, 1995	
Metropolitan Court Reporters	\$484.85
Evid. Depo. of W. Joseph Ketcherside, June 27, 1995	
Evid. Depo. of Michael Dreiling, June 27, 1995	

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert W. Harris, Kansas City, KS  
Timothy G. Lutz, Overland Park, KS  
Sean B. Summers, Kansas City, MO  
Patrick J. Gregory, Overland Park, KS  
Steven J. Howard, Administrative Law Judge  
Philip S. Harness, Director